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# A RIGHT OF THE UNBORN CHILD TO PRENATAL CARE – THE CIVIL LAW PERSPECTIVE

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Article abstract

Le droit québécois reconnaît déjà qu'avant la naissance un enfant conçu tombe sous l'article 1053 C. C. pour le maintien d'une action pour dommages prénataux. Mais qu'arrive-t-il si le tort à l'enfant, avant sa naissance, résulte d'un manque de soins prénataux nécessaires, ou de l'abus de l'alcool, du tabac ou de drogues ? La mère devrait-elle en être responsable, ou seulement les tiers ? Si oui, comment le « droit de l'enfant aux soins prénataux » survivrait-il face au « droit à l'avortement » de la femme enceinte ? Ce sont quelques-unes des questions que nous évoquons et pour lesquelles nous ébauchons des réponses dans le présent article.

Nous soutenons dans cet article que la loi devrait se préoccuper non seulement de compenser l'enfant après la naissance pour les dommages prénataux, mais également de le protéger contre la négligence et les abus avant la naissance. Cette nouvelle orientation juridique est imposée en grande partie par ce nouveau champ de connaissances médicales sans cesse grandissant qui traite des besoins et des vulnérabilités physiologiques et psychologiques du fœtus. Les handicaps et les infirmités des enfants et des adultes, lesquels sont souvent permanents, peuvent avoir leur origine dans l'abus ou la négligence évitable durant la période prénatale. Le droit ne peut plus ignorer la continuité fondamentale qui existe entre les besoins en soins de santé et les dommages résultant à la santé de l'enfant avant et après la naissance.

Les mécanismes juridiques nécessaires à la protection du fœtus ont leur point de départ dans ceux qui existent déjà pour la protection de l'enfant. Il est pourtant évident qu'il faudra les adapter au statut et aux besoins spécifiques du fœtus, et qu'il faudra en élaborer d'autres. Les précédents et, le soutien pour de telles réformes se trouvent dans le Code civil, le Projet du Code civil, le Livre I (nouveau) Code civil du Québec et la *Loi de la protection de la jeunesse*.

En guise de conclusion, nous soutenons ici qu'une naissance vivante et viable ne doit plus constituer une condition suspensive pour le droit à la vie, à l'inviolabilité et aux soins prénataux; mais que le fœtus doit bénéficier de ces droits à la condition résolutoire de ne pas naître vivant et viable.

# A RIGHT OF THE UNBORN CHILD TO PRENATAL CARE — THE CIVIL LAW PERSPECTIVE

by E.W. KEYSERLINGK*

*Le droit québécois reconnaît déjà qu'avant la naissance un enfant conçu tombe sous l'article 1053 C.C. pour le maintien d'une action pour dommages prénataux. Mais qu'arrive-t-il si le tort à l'enfant, avant sa naissance, résulte d'un manque de soins prénataux nécessaires, ou de l'abus de l'alcool, du tabac ou de drogues? La mère devrait-elle en être responsable, ou seulement les tiers? Si oui, comment le "droit de l'enfant aux soins prénataux" survivrait-il face au "droit à l'avortement" de la femme enceinte? Ce sont quelques-unes des questions que nous évoquons et pour lesquelles nous ébauchons des réponses dans le présent article.*

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*Les mécanismes juridiques nécessaires à la protection du foetus ont leur point de départ dans ceux qui existent déjà pour la protection de l'enfant. Il est pourtant évident qu'il faudra les adapter au statut et aux besoins spécifiques du foetus, et qu'il faudra en élaborer d'autres. Les précédents et le soutien pour de telles réformes se trouvent dans le Code civil, le Projet du Code civil, le Livre I du (nouveau) Code civil du Québec et la* Loi de la protection de la jeunesse.

*En guise de conclusion, nous soutenons ici qu'une naissance vivante et viable ne doit plus constituer une condition* suspensive *pour le droit à la vie, à l'inviolabilité et aux soins prénataux; mais que le foetus doit bénéficier de ces droits à la condition* résolutoire *de ne pas naître vivant et viable.*

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## SUMMARY

## INTRODUCTION

This paper will explore what might be called the "right to prenatal care", and will propose a somewhat radical expansion of the content of the obligation flowing from that right. The legal perspective adopted is largely, but not exclusively, that of civil law, particularly as manifested in (or at least relevant to) the Civil Code, doctrine and jurisprudence of Québec. The approach herein will be somewhat preliminary, tentative, general and selective. It should be acknowledged at the outset that to compellingly argue, on grounds of needs, logic and coherence alone, for a new or expanded "right to prenatal care", provides the *necessary* but not quite *sufficient* grounds to proceed in that new direction. To make the argument sufficiently compelling requires as well the detailed consideration of particular protective mechanisms and procedures adapted to the quite unique situation of unborn children — inseparable from and dependant upon their mothers-to-be until birth and for that very reason extremely vulnerable to maternal acts or omissions. Those mechanisms and procedures must accomplish at least two goals — give the right to prenatal care practical effect at every point from the reporting to the protecting stages, and ensure that by promoting this right, parties other than the unborn are not unfairly treated and competing rights not overlooked. This paper does not pretend to provide those mechanisms and processes in all their detail and fine points. But it does seek to provide, in the form of arguments from needs, logic and coherence, the necessary first step and basis to make the continuing search for concrete and appropriate mechanisms a justifiable and even imperative next stage of this research.

## I. IDENTIFYING THE OBLIGATION

### 1. The Content and Subjects

The hypothesis herein advanced is that the conceived but unborn should be subjects of a right to prenatal care, a right which belongs to the unborn themselves, and not to parents, mothers or anyone else. In civil law terms our proposal is to the effect that the conceived but unborn child should be the creditor of an obligation of prenatal care.

As regards the content of the obligation, in our view what is owed to the unborn before birth should now be considerably expanded beyond what is in effect only an obligation not to harm the unborn by negligent *acts*. As we shall discuss below in greater detail (see Part II, 2.), that is arguably the essence of the legal obligation owed to the unborn (as regards prenatal physical injury) established by *Montreal*

*Tramways* v. *Léveillé* in 1933.[1] As determined by that decision then, the unborn child comes within the meaning of "another" in article 1053 C.C., at least for the purpose of maintaining an action for prenatal injury flowing from an accident suffered by the mother resulting from a third party's negligence.

But article 1053 C.C. assigns delictual responsibility for damage caused by fault resulting not only from positive acts, but also from "... imprudence, neglect or want of skill". To date the doctrinal and jurisprudential interest in the matter of physical injuries to the unborn, whether as violations of legal or contractual obligations, has given little or no attention to harm resulting both from a wide range of now acknowledged-to-be-harmful *positive* acts, and acts of neglect or *omission*. It is our contention that both delictual and contractual responsibility should extend to a far wider range of positive acts, acts of omission and instances of neglect than is yet acknowledged.

More specifically, in the category of acts of omission or neglect which (potentially) violate obligations to the unborn, we could include for example: not providing the unborn child with adequate diet or nutrition, or inadequate prenatal medical checkups, particularly in cases of high-risk pregnancies. In the category of positive acts potentially violating obligations to the unborn we would include for example: careless exposure to infectious diseases, inaccurate medical advice as to prenatal care, excessive maternal cigarette, alcohol or drug consumption and maternal drug addiction. As we will attempt to establish below (Part III), all these and other omissions and acts constitute potentially serious and often permanent health and development hazards to the unborn, and therefore are eligible as elements of the content of the expanded right to prenatal care, and the particular obligations it entails.

If the unborn is to be the creditor of the obligation to provide prenatal care, who are the debtors? As will be evident from the content of the obligation as just indicated, the debtors of that obligation will have to include parties other than just third parties such as a tramway conductor who pushes a pregnant mother out of a tram[2] or a car driver whose car crashes into one containing a pregnant woman.[3] In our view those who would be debtors of one or more of the elements of this obligation should be (at least): physicians, hospitals, social welfare

1. *Montreal Tramways* v. *Léveillé*, (1933) 4 D.L.R. 337 (S.C.C.).
2. *Ibid.*
3. *Duval* v. *Seguin*, (1972) 26 D.L.R. (3d) 418.

institutions and prenatal care clinics, and the pregnant women themselves. Insofar as each of these parties (and others) could be said to have a determinative influence and power over one or more of the indicated elements of needed prenatal care, they are debtors of the obligation to provide it.

As will become increasingly evident, the particular class of debtors of this obligation of most interest to us in this paper, is that of pregnant mothers-to-be. There are some serious policy objections to including the pregnant mother among those who have (legal) duties to their unborn children and who may consequently be sued for negligent acts or omissions causing prenatal harm to their children. In Part IV of the paper we will discuss this specific issue in some detail. Suffice it to note at this point that we see no compelling legal or policy obstacle to including the pregnant mother among those who are debtors of the obligation to provide adequate prenatal care. In our view, not to do so would be both unjust and illogical.

### 2. Legal Compensation and Legal Protection

As far as the unborn child is concerned, the emphasis to date as regards physical injury and harm to health has been almost exclusively on compensation after the event and after birth. Statutory or court-ordered protective mechanisms and anticipatory interventions before birth to protect the unborn's life or health against (further) abuse, or to ensure provision of needed care, are, as we shall indicate, non-existent at worst, incoherent and unpredictable at best.

In Part III we will gather some of the medical/biological evidence indicating the basic health and care needs as well as the vulnerability of the unborn while unborn, and the extent to which prenatal injuries or deprivations are responsible for serious and often permanent disabilities and limitations in childhood and adulthood. Without pretending that law alone will ever effectively protect unborn health, it is our contention that unborn health and life, because it is as or more vulnerable to harm and injury than is the health of children, and because there is an essential continuity (as regards the life, needs and effects of health disabilities) between the unborn and the child, there should be available to the unborn while unborn essentially the same legal protections and interventions available to children.

This is not to say that the availability to the unborn of the exercise of a *post factum* and postnatal right of action to compensate for prenatal injury should not remain available and even expand. It should. But new medical and biological knowledge now urges the legal response as regards the unborn to shift to a protective stance as well,

and focus that protection on the period from conception to birth when it is most needed. To begin to effectively provide more of that sort of legal protection for the unborn would constitute a practical response to the United Nations appeal in its Declaration of the Rights of the Child over twenty years ago:

> "The Child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[4]

### 3. The Intensity of Obligation and Regimes of Liability

The intensity of the obligation to provide prenatal care should be consistent with the content and intent of the obligation, and not impose an unfair and unacceptable burden on any of the parties, either as regards performing the legal or contractual duty, or as regards the burden of proving fault, damage and the causal connection between fault and damage. In our view, in the case of all the above-mentioned debtors, that is, physicians, hospitals and others, the intensity of the duty of care or security involved in prenatal care should be that of diligence and not result or warranty.

The obligation of diligence (or means) has been defined as,

> "... l'obligation pour la satisfaction de laquelle le débiteur n'est tenu que d'employer les meilleurs moyens possibles, d'agir avec prudence et diligence en vue d'obtenir un résultat, mais sans toutefois se porter garant de celui-ci."[5]

There are a number of reasons why an obligation of diligence is appropriate for the obligation to provide prenatal care as regards for example physicians, hospitals and parents. In the first place this is already recognized in doctrine and jurisprudence to be the intensity of the obligation of a physician to his patient.[6] Secondly, while there is

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4. Preamble, *Declaration of the Rights of the Child*, 14th Session of the U.N. General Assembly, G.A. Res. 1386, 14 U.N. GAOR Supp. 16 at 19, U.N. Doc. A/4354 (1959).

5. Jean-Louis BAUDOUIN, *Les Obligations*, Les Presses de l'Université de Montréal, 1970, at p. 16.

   He defines an obligation of result as, "... l'obligation pour la satisfaction de laquelle le débiteur est tenu de fournir au créancier un résultat précis fixé à l'avance". *Id.*, at p. 16.

   See also, P.-A. CRÉPEAU, "Le contenu obligationnel du contrat", (1965) *Rev. Bar. Can.* 1; "Des régimes contractuel et délictuel de responsabilité civile en droit civil canadien", (1962) 22 *R. du B.* 501.

6. See P.-A. CRÉPEAU, "La responsabilité médicale et hospitalière", (1960) 20 *R. du B.* 433, 472; *X* v. *Mellen*, (1957) B.R. 389; *Beausoleil* v. *Communauté des Soeurs de la Charité de la Providence*, (1965) B.R. 37.

every reason to insist that the physician's and hospital's duty to the unborn should be as onerous as it is to children and adults, there is no reason to argue that it should be *more* onerous, and that he is obliged to do more for the unborn patient than he is for the born patient. The same applies to the maternal obligation to the unborn. Since each parent has an obligation of diligence to care for and provide for their children as a "bon père (now, mère, as well) de famille", one could hardly insist that their obligation to care for and provide for their unborn children should be of a greater intensity.

In the case of physicians then, their obligation towards the unborn would not be to prevent or cure all injuries or disabilities, but to exercise the reasonable skill, attention and care of the reasonably competent physician in the same circumstances, attempting to promote healthy development by protecting from harm and providing adequate prenatal care and treatment. The hospital's obligation of diligence to the unborn would include providing adequate prenatal care facilities and equipment, skilled and competent pediatric personnel and adequate observation of mother and unborn child while in the care of the hospital. The mother's obligation of diligence as well would extend to taking reasonable precautions to avoid exposing the unborn to infectious diseases, avoiding excessive alcohol, cigarettes and drug-taking, providing adequate diet and nourishment, etc. She would not be obliged (by an obligation of result) to produce a baby perfect in every respect!

As regards the burden of proof, if the obligation is one of diligence then the mere proof of injury or damage to the unborn resulting from the defendant's act or omission will not be sufficient to establish a *prima facie* in-execution or fault. As always in the case of an obligation of diligence, here too the (unborn) plaintiff would have to prove fault, damage resulting and a causal connection between them. The (unborn) plaintiff in other words must *prove* the absence of reasonable care or negligence, a more onerous duty than he would have if the obligation were one of result. In our view the burden on the (unborn) plaintiff should not be any less than it is for the child or adult patient. To decide otherwise would impose unjustifiable burdens on doctors, hospitals, and mothers.[7]

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7. On the other hand, because the burden on the plaintiff, when the obligation is only one of diligence, is sometimes very heavy indeed, there is provision in civil law for presumptions of law and of fact. See articles 1238 C.C., 1239 C.C., 1242 C.C. That they could be applicable in the context of actions for prenatal injury is demonstrated by *Montreal Tramways* v. *Léveillé*, (*supra*, note 1) in which the Court justified the application of a presumption of fact to draw a "reasonable

We come now to the issue of which regime of liability is to apply to violations of the obligation to provide prenatal care — are such violations contractual or delictual? Inasmuch as we will not be concerned in this paper with the different practical implications involved with each regime — quantum of damages and so forth — the particular regime applicable is not of vital importance in practice. As well, it has been convincingly established that the choice of degree of intensity of the obligation does not depend upon the regime of liability.[8] Obligations of diligence (or result) exist within *both* regimes of liability.

It is nevertheless of interest to determine which regime applies in our case, if only because that determination depends inescapably upon whether the identity or legal personality of the unborn child is to be considered inseparable and indistinguishable from that of the mother, or, on the contrary, each has a separate and distinct legal personality. If the former, then it follows that there could not really be an obligation to the unborn child as such since obligations require subjects. In effect there would be one obligation — that of prenatal care to the pregnant woman, of which obligation physicians and hospitals, but obviously not the mother herself, would be debtors.[9]

In this scenario, the regime of liability would arguably be contractual, not delictual, as the two parties to the obligation, physician and mother, would be bound by a true contract, based on mutual consent.[10] The applicable articles of the Civil Code would be especially article 1024 to determine the content of the contractual obligation, then article 1065 to establish that the debtor physician (or hospital) is responsible for damages resulting from the breach of the obligation.

But if, on the other hand, the unborn child is to be considered as having his own juridical personality, separate from that of his mother, (which is our choice) then it follows that an obligation to provide prenatal care would be to the unborn child in his own right. This need

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inference" that there was a causal relationship between the accident to the mother and the child's deformity.

8. See P.-A. CRÉPEAU, *op. cit.*, notes 5 and 6.

9. The fact that there would be no obligation as such to the unborn child need not mean that there would be no duty upon others, i.e. doctors, not to harm him by act or omission. It would only mean that the creditor of such an obligation would not be the unborn child, since not a subject, but perhaps the mother or family.

10. See P.-A. CRÉPEAU, "La responsabilité médicale et hospitalière", *op. cit.*, note 6, at p. 452 ff.

not and should not mean that a physician does not *also* have an obligation to provide prenatal care to the pregnant mother — but *she* would be a creditor of that obligation only insofar as it affects her, whereas the *unborn child* would be a creditor of that obligation insofar as it affects him.

In practice and for practical purposes, it may be of little importance to posit two separate creditors with (to some extent) different interests at stake. After all, to a large extent the well-being of mother and unborn child is indivisible or at least very closely interrelated. And though the unborn child is incapable of consent, the mother and (perhaps) the father are *de jure* and *de facto* able to consent for him; it would be reasonable to conclude that when the physician is the debtor and the mother and unborn child the creditors, the obligation to provide prenatal care is within a regime of contractual and not delictual responsibility.

But the *Léveillé* decision in holding that the unborn child falls within the meaning of "another" in article 1053, supports a conclusion that at least when the debtor is a third party other than a physician, the regime of liability is delictual. Clearly in the case of injuries resulting from accidents inflicted by previously unknown parties, there can be no question of consent by anyone and hence liability could not be contractual. And, as for the pregnant mother, herself a debtor of the obligation of prenatal care to the unborn, it is difficult to posit a regime of liability other than delictual, except perhaps for the rare cases when a curator is appointed to consent for the unborn in its own interests. After all, insofar as (as we hope to establish below) the mother is herself a debtor of the obligation to provide prenatal care to her child, she could hardly at the same time vis-à-vis her obligation consent on behalf of its creditor, her unborn child.

The latter discussion as to regimes of liability might be seen by some as largely academic, but we would disagree.[10a] Its practical element is that considerations as to the appropriate regime of liability

10a. The recent and somewhat puzzling Supreme Court of Canada decision of June 22, 1981, reversing the majority Court of Appeal decision in the *Wabasso* case (*The National Drying Machinery Co.* v. *Wabasso Ltd.*, (1979) C.A. 279) is an example of the view that a distinction between regimes is more or less academic and optional, in that the same act may be considered at one and the same time a contractual fault or a delictual fault. See the reasons for judgment at p. 14. But see also P.-A. CRÉPEAU, "La responsabilité civile de l'établissement hospitalier en droit civil canadien", (1981) 26 *McGill Law Journal* at p. 693, note 66. On grounds of logic and coherence Crépeau takes issue with that conclusion of the Supreme Court, and compellingly argues that it is "juridically inadmissible".

arise inescapably once one posits, as we do, that mother and unborn child should be considered separate and individual juridical persons, persons whose interests will inevitably at times be in conflict.

### 4. The Unborn Child as Juridical Person — from Needs to Rights

Central to our thesis is that the unborn child should be explicitly acknowledged to have juridical personality, and the fundamental rights which flow from such recognition, namely the rights to life and inviolability, and (consequently) a right to prenatal care. This right to prenatal care is being proposed as a right giving rise to an obligation of which the unborn child himself is the creditor. It should be classified as a *positive* right in that it entails not only a duty not to interfere, not to harm by positive acts, but also a duty on identifiable debtors to assist, to maintain, to support, and to protect the unborn child. As we shall argue in what follows, a mere duty on others to protect or assist the unborn child by positing not the unborn child but the mother, or someone else, or society as the creditor of that obligation, would not adequately respond to or protect the realities of the unborn child's needs. Nor would such an approach adequately reflect the continuity between unborn and born child.

But the juridical personality of the unborn child does not represent for us a starting point, a premise or a position to be arrived at only on the basis of arguments drawn from pure legal or philosophical reasoning. Rather the unborn's legal personality is for us a *conclusion.* It is a conclusion eminently consistent with legal reasoning, but more "existentially" and convincingly established on the three related grounds of the *needs* (medical, nutritional, emotional and protective) of the unborn child while still unborn, the similarity between unborn and born child in terms of *vulnerability*, and the *continuity* between them as regards the continuing (and often permanent) effects of prenatal injuries.

If the needs of child and unborn child are very similar and there is evident continuity between them, then an argument and conclusion from analogy is surely justified, namely, that therefore the legal obligations, protections and compensations available to the born child should also (with necessary adaptations of course) be available to the unborn child before birth. And if those legal obligations, protections and compensations in the case of children are based upon an acknowledgement that children have juridical personality, then that acknowledgement should also be extended to the unborn while still unborn.

What is at issue here is not the personhood of the unborn child in the biological or ontological sense. From those perspectives the issue of personhood more frequently has to do with when, during gestation, one begins to be a person, and it turns on matters such as morphological features, genetic foundation, or "potential for rational self-awareness".[11] Those perspectives and concerns are of course of great importance. But the philosophical and biological positions and arguments continue to be so many, so different and so contentious, that agreement or consensus remains as unlikely as ever. Still more to the point, in the Civil Code and in civil law generally, the question of whether one is a person or not is more a question of law than of (biological or ontological) fact.

It is not of course that biological facts and philosophical arguments are irrelevant to the acknowledgement of legal personality. It is simply that law may assign juridical personality to whomever (or whatever) it wishes more or less independently of biological properties or inherent capabilities alone. For instance it recognizes corporations as "moral persons".[12] And by invoking its traditional interest in coherence and consistency, law could also extend legal personhood and legal protections to the unborn child from the time of conception, whatever the physiological or genetic capabilities or potentialities.

After all, the newborn is surely no more capable than is the unborn of responsibility for his acts and of choosing freely. Both are essentially only capable of being supported, nourished and protected from neglect or abuse. Yet at present at the moment of viable birth the law grants full legal personality (though with limits on the *exercise* of rights), and a full range of legal protections to the newborn. But for most practical purposes the unborn is granted neither the personality nor the protection.

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11. For example, see E.-H.W. KLUGE, who writes "... an individual may be counted as a person if and only if he is now thus self-aware or can acquire such an awareness without it being necessary that he undergo a fundamental constitutive change in his physiological make-up in order to have such an awareness". (1977) 3 *Dalhousie Law Journal* 837, at p. 842.

    See also, E. W. KEYSERLINGK, *Sanctity of Life or Quality of Life*, Law Reform Commission of Canada, 1979, at p. 75.

12. See on this Suzanne PHILIPS-NOOTENS, "Le statut juridique de l'enfant à naître: réalité ou néant?", (unpublished paper), McGill University, Faculty of Law, December, 1980, at p. 3.

## II. PRESENT FOETAL STATUS, RIGHTS AND PROTECTIONS

Next on the agenda is a brief survey of the status, rights and protections of the foetus as acknowledged by law up to our times. It will be concluded that it is exceedingly difficult to find a firm anchorhold for a right to prenatal care, the reason being that the juridical status of the unborn is unclear and incoherent, and its legal protections while unborn, particularly as regards anticipatory interventions, are practically non-existent.

### 1. The Civil Code and Charter of Rights

As it regards the unborn child, the Civil Code has been primarily concerned with patrimonial rights, as evidenced in articles 338, 345, 608, 771, 838 and 945. Article 338 C.C. stipulates the persons to whom curators may be given, among them children conceived but not yet born. Article 608 C.C. in effect acknowledges that the conceived but unborn at the moment a succession devolves is "civilly in existence", but only for purposes of inheritance, and viable birth is a condition precedent to actual inheritance. Article 771 C.C. deals with the capacity to give or receive *inter vivos*, and once again the conceived but unborn may receive gifts only on the condition precedent of viable birth. Article 838 stipulates that the capacity to receive by will also applies to the conceived but unborn, again on the condition precedent of subsequent viable birth.

Article 345 C.C. is of particular interest. It states:

> "The curator to a child conceived but not yet born is bound to act for such child whenever its interests require it; he has until its birth the administration of the property which is to belong to it and afterwards he is bound to render an account of such administration."

It is sometimes claimed or suggested that this article is the basis for the unborn child's exercise of a wide range of rights well beyond just his patrimonial rights. Such a suggestion is at least implicit for example in this statement by Jean-Louis Baudouin on the subject of article 345 C.C.:

> "Dès le moment de la conception, cet enfant possède en effet toute une série de droits civils... Étant naturellement dans l'impossibilité d'exercer ses droits, la loi, qui entend protéger celui qui ne peut agir, lui nomme un curateur (curateur au ventre) qui les exerce à sa place."[13]

In a similar vein, Judge Lamont in *Montreal Tramways Co.* v. *Léveillé* maintained that article 345 should not be understood to apply

13. BAUDOUIN, *op. cit.*, note 5, at p. 108.

only to property matters, that in fact the other articles which refer to property and inheritance (cited above) do not limit the meaning of article 345 C.C. which is general in meaning, but only provide "illustrative instances of the rule [of art. 345 C.C.] that an unborn child shall be deemed to be born whenever its interests require it".[14]

He also cites (on the same page) Mignault's *Droit Civil Canadien* on the subject of the naming of a curator according to article 345 C.C., to the effect that, "Il n'est pas nécessaire de citer les cas qui nécessitent cette nomination. Elle se fait dans tous les cas où l'intérêt de l'enfant l'exige".[15]

However, while with respect to legal history and legal theory, Baudouin, Lamont and Mignault are undoubtedly correct, in actual practice article 345 appears to be applied only to the administration of property referred to in the article itself. Which may well explain why none of the three cited above provided any actual examples of the application of article 345 to other than patrimonial interests.

Closer to a description of the actual use and practical application of article 345 is probably the following:

> "Étant donné que l'enfant conçu mais non encore né n'est pas encore une personne son curateur ne peut avoir de pouvoirs que sur ses biens. Il joue un rôle strictement administratif... que les auteurs interprètent de façon très restrictive."[16]

Clearly then, the Code emphasis on patrimonial rights of the unborn and the condition precedent of viable birth do not betray a concern for the person of unborn as such while still unborn. The available anticipatory mechanism of curatorship to the womb, and the acknowledged inheritance and property rights, are all in effect only protections of the unborn child's property in anticipation of birth.

Both article 608 C.C. and article 345 C.C. were omitted from the Draft Civil Code. Article I.28 of the Draft is based, we are told, on article 608 C.C.[17] Article I.28 Draft reads: "A child conceived is deemed born provided he is born live and viable". While one cannot necessarily interpret this proposed article as an acknowledgement of

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14. *Montreal Tramways Co.* v. *Léveillé*, (*supra*, note 1) at p. 342.

15. *Id.*, at p. 343.

16. Luce PATENAUDE, "Capacité (tutelle et curatelle)", [Tiré à part du cours DRT 104 — Droit civil III — Sujets de droit et famille], La Librairie de l'Université de Montréal, 1975, at p. 128.

17. Civil Code Revision Office, *Report on the Québec Civil Code*, Vol. II, Commentaries, Éditeur officiel, 1977, Québec, at p. 29.

the unborn's legal personality and personal rights, it may nevertheless serve as a better anchor hold for them than anything in the present Code. What makes this likely is that the "nasciturus" and "viability" principles are no longer in article I.28 Draft focused exclusively on patrimonial rights, as they were for example in the antecedent article 608 C.C. The more general nature of article I.28 Draft appears to support a conclusion that there need no longer be any limitation to the rights or interests for which the unborn child may be "deemed born".

Still another Civil Code article is of interest to us here, namely article 18 (par. 1):

> "Every human being possesses juridical personality."

The same wording is found in article I:1 of the Draft Code. In the *Charter of Rights and Freedoms*, (art. 1) juridical personality is also affirmed, but in the context of a more detailed statement:

> "Every human being has a right to life and security, to physical integrity and the liberty of his person. He also possesses juridical personality."

Article 19 C.C. affirms that,

> "The human person is inviolable. No one may cause harm to the person of another without his consent, or without being authorized by law to do so."

But none of the above articles (or any other) provide a precise definition as to who are to be included within the class of "human being" entitled to possess juridical personality, being inviolable and having the right to life and physical integrity. There is no evidence whatsoever that those actual or proposed articles were intended to include the unborn child within the meaning of "human being". In fact the wording of article 18 (par. 2) C.C. implies that the real interest of the legislator was to affirm that aliens as well as citizens have juridical personality, rather than to state a general principle which would include all (*de facto*) "human beings", including the unborn.

### 2. **The Right of Action for Prenatal Injury**

If the status and rights of the unborn remain unclear and restricted in the Civil Code, is it otherwise in civil law jurisprudence, particularly as regards the right of the unborn to maintain an action for prenatal injury? We will consider first of all *Montreal Tramways Co.* v. *Léveillé*.[18]

On the one hand it is rightly considered to be a "breakthrough case". More clearly than any case (Canadian or American) since the

18. *Montreal Tramways Co.* v. *Léveillé* (*supra*, note 1).

famous Holmes dictum of 1884 in *Dietrich* v. *Northhampton*,[19] the *Léveillé* case established the following: that the conceived but unborn was not only a separate biological being, but also that it should be (for a limited purpose and within strict conditions) a separate legal being as well, not identifiable in all respects with the legal being of its mother; that not only did the unborn's property need legal protection, but negligent injuries to the unborn's physical integrity justified a right of action for compensation.

There can be no denying the landmark quality in its time of the assertion by Lamont J. that:

> "Being an existing person in the eyes of the law it [the unborn child] comes within the meaning of "another" in article 1053 C.C. and is, therefore entitled through its tutor to maintain the action."[20]

But in several respects it falls well short of responding to the concerns of most interest in this paper — securing for the unborn not only a right of action once born for prenatal injury inflicted by third party strangers, but also determining the obligation and liability of the pregnant mother towards her unborn child, and providing the unborn while still unborn with needed legal protections to secure needed assistance and to protect against abuse.

For example Lamont J. (given the particular facts of the case) is exclusively concerned with the *post factum* and postnatal exercise of the right of action and securing of compensation. Which makes his assertion that the unborn is a person at the time of injury of little practical consequence. He also upholds the condition precedent of viable birth discussed above, thus qualifying somewhat the assertion that the unborn child is a person. In fact even Lamont J. is not untypical of several common law judgments, in that once having put at centre stage the *exercise* of the action for damages, rather than its *acquisition*, it is a small step to adopt the fiction that the injury really takes place at and from the time of birth. As Lamont J. put it:

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19. *Dietrich* v. *Northhampton*, 52 Am. R. 242 (1884). What Holmes said was, "An unborn child has no existence as a human being separate from its mother; therefore it may not recover for the wrongful conduct of another".

20. *Montreal Tramways Co.* v. *Léveillé*, (*supra*, note 1, at p. 346).

    Christopher GRAY considers this statement (alone) to be the ratio of the judgment, contrary to many other comments which have picked other parts and points in the judgment as the ratio. Gray also notes, and with reason: "Nothing could be more forceful than that statement, and this is nearly the only case in which so straightforward a phrase can be found. This case has been seminal among the citations at common law under similar facts." See his, "The Notion of Person for Medical Law", (1981) 11 *R.D.U.S.* 341, 373.

> "... when it was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the Company produced its damage on the birth of the child and the right of action was then complete."[21]

This exclusive focus on postnatal exercise of the right of action, accompanied by the fiction that the injury as well was postnatal is even more evident in this statement by Cannon J. in *Léveillé*:

> "... aussi longtemps qu'elle était dans le sein de sa mère, il est évident qu'elle ne souffrait aucun dommage, aucun inconvénient et aucun préjudice. Aucune action en responsabilité n'était ouverte. Ce n'est que lorsque le préjudice certain a été souffert que ses droits ont été lésés, qu'elle est devenue une victime ayant des droits à réparation. C'est de ce moment, après sa naissance, que son droit a commencé."[22]

A common law example of the same fiction is to be found in the judgment of Fraser J. in *Duval* v. *Seguin*, who stated:

> "While it was the foetus or child *en ventre sa mère* who was injured, the damages sued for are the damages suffered by the plaintiff Ann since birth and which she will continue to suffer as a result of that injury."[23]

Such a fiction may have been tenable as long as the only concern was the unborn's exercise of a right of action for prenatal injury. Since that right could not be exercised until the injury was known, nothing could actually be done until birth. But insofar as our knowledge of the needs and vulnerability of the unborn child has vastly expanded in recent years, making imperative the availability *before birth* of legal protections and interventions to supply needs and prevent further abuse, in our view both the acquisition and (if necessary) exercise of the unborn's right to those protections must be present before birth. Since the needs of adequate health care and legal protections are present while still unborn, it need not be considered a legal fiction to maintain that legal personality and the rights which flow from it should be concomitant in time with the needs and/or injuries.

Wrongful death actions, generally the subject of wrongful death statutes in the United States are of two sorts as regards the unborn. The first is that in which the child is born alive and subsequently dies as a result of prenatal injuries. The second sort of wrongful death action concerns unborn children who died *in utero* as a result of prenatal injury.

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21. *Id.*, at p. 344.

22. *Id.*, at p. 477.

23. *Duval* v. *Seguin*, (1972) 26 D.L.R. (3d) 418, at p. 433.

It could be, and has been, maintained that successful wrongful death actions, are at least implicitly recognitions of the legal personality of the unborn. Michèle Rivet for example has stated:

> "Il est évident que reconnaître intégralement le 'wrongful death action' signifie, somme toute, reconnaître que le foetus est une personne, qu'il a en tant que tel la personnalité juridique."[24]

But a study of wrongful death cases may not in fact support such a conclusion. In *Langlois* v. *Meunier*, an action for damages for the loss of a child likely to have been born viable but aborted after a negligent injury, Vallerand J. clearly did not consider that unborn child a person. He stated in part:

> "Cet enfant à naître n'est certes pas une personne et les principes du droit civil concernant le décès ne peuvent s'y appliquer. Il n'est pas non plus une chose, non plus qu'un membre ou un organe de sa mère. Il ne se situe à vrai dire, dans aucune catégorie de biens ou de personnes qu'identifie la loi. Cela ne signifie pas pour autant que sa perte ne constitue pas un dommage."[25]

As well, in wrongful death actions it is not even the child who is claiming the compensation. For,

> "... in a death action it is the parents that are claiming compensation, not the foetus. As long as the parents are recognized to have a compensable interest in the case of death caused by prenatal injuries where the infant initially survives birth, there is no reason why recovery should be denied in still birth cases. The essential interest in both situations is the expectation of the parents..."[26]

In Part V we will discuss still another type of action for prenatal injury, namely the action for "wrongful life". These are typically actions in which a defective child sues a physician (or anyone else) on the ground that he or she would have been better off never having been born.

### 3. Protective Interventions by the Courts

A number of American decisions have come close to providing the sort of protective and anticipatory interventions we are promoting. One example is the 1961 New Jersey case of *Hoener* v. *Bertinato*.[27] The mother had an RH negative blood condition, and the medical evidence

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24. Michèle RIVET, "Esquisse d'un profil de la personne selon le droit", (1981) 11 *R.D.U.S.* 417, at p. 453.

25. *Dame Langlois* v. *Meunier*, (1973) C.S. 301, at p. 305.

26. (Note), "The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries", (1962) *U. of Penn. L. Rev.* 554, at p. 556, note 18.

27. *Hoener* v. *Bertinato*, 171 A. (2d) 140 (Jur & Dom. Rel., c.4, 1961).

established that as a result of this condition, unless a blood transfusion was given soon after birth the child would die. But the Jehovah's Witness parents refused to give consent to the transfusion. Therefore the court invoked jurisdiction over the unborn child under a child protection statute while still unborn, awarded custody of the child, when born, to the County Welfare Department and authorized that Department to consent to the transfusion. But, while this case went some distance towards our goal in that injunctive relief was granted to the unborn *in utero*, that relief was of course only to be effectively supplied once born. The Court was therefore ensuring the health and safety of the child from the time of birth, but not before.

A second blood transfusion case of 1964 did in fact provide for a protective intervention *before* birth, and as such it is therefore within the range of protections of interest to us. In *Raleigh Fitkin — Paul Morgan Memorial Hospital* v. *Anderson*,[28] the pregnant mother was once again a Jehovah's Witness. But in this case the medical evidence established the probability that at some stage in the pregnancy the mother would hemorrhage seriously, and that if a transfusion were not given at that point, the child and mother would die. The mother let the hospital know that she would refuse the transfusion, and the Court appointed a guardian for the hospital to consent to the transfusion if it became necessary. Saving the life of the unborn was clearly the preoccupation of the court, since the mother if not pregnant would have had the right to refuse it even if she were to die. But since the only way to save the unborn child would be to give the transfusion to the mother, the Court in effect ordered her to submit to it. As the Court noted, "... the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them...[29]

Clearly this decision in effect acknowledges the right of the unborn child to a court-ordered protective intervention before birth to be provided with a particular life saving assistance, also before birth. And the order was provided exclusively in the interests of the unborn child without the mother's consent, indeed over her objections.

A third decision of relevance is that of *People* v. *Yates*.[30] The issue was whether the unborn child had a right to support by the father while

28. *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson*, 201 A. (2d) 537 (1964).

29. *Id.*, at p. 538.

30. *People* v. *Yates*, 298 P. 961 (Super. Ct. 1931).

yet unborn. The case was brought under a section of the California Penal Code (Cal. Pen. Code No. 127) providing that parents of minors who do not provide necessary clothing, food, shelter or medical assistance are guilty of a misdemeanor *and* that a child conceived but not yet born is to be deemed an existing person insofar as this section is concerned. The unborn child in this case was found to have the right to support while unborn and the father liable for failing to provide it. The court held that, "... impairment of [mother's] health would adversely affect the child she was carrying, and her death would be fatal to it".[31]

## III. THE VULNERABILITY AND HEALTH NEEDS OF THE UNBORN CHILD

Recent medical and biological knowledge about the vulnerability and health needs of the foetus provides crucially important incremental and indirect support for this article's legal analyses and proposals. This evidence, in our view, indicates the need for more and earlier legal protections, and an expansion of obligations the violation of which will constitute actionable fault. Of particular interest to us here is the degree to which there is analogy and continuity between the vulnerability and injuries of the unborn and of children. Since what follows must be brief and selective, only the medical and developmental effects of acts or omissions not presently considered to be within the scope of maternal or third party liability will be indicated.

It should be noted first of all that not every unborn is equally susceptible to harm from the various substances, acts or omissions which can be seriously harmful. Much depends upon the innate and different genetic and physiological make-up, strengths and weaknesses of each unborn child. As well, the same substance, act or omission will have more or less seriously harmful effects depending upon the stage of differentiation occurring in the newborn's tissues and organs. Both these factors are obviously relevant to questions of establishing reasonable and generally applicable standards of exposure to those substances, and to questions of proof and causality after injuries have been suffered.

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31. *Id.*, at p. 963.

Due to the unusual addition to the Code section in question, which equates the unborn with person for the purpose of support, *Yates* and similar decisions have been called "aberrant" because, it is argued, they are out of step with case law and statutory law which do not generally recognize a right of the unborn to receive support. See Karen G. CROCKETT and Miriam HYMAN, "Live Birth: A Condition Precedent to Recognition of Rights", (1976) *Hofstra Law Review* 805, at p. 831.

As to the potentially harmful substances themselves, drugs deserve to head the list.[32] Given the vast increase in drug use by pregnant women, it has been noted that, "... the foetus is potentially at greater risk from well intentioned medicaments than from the vicissitudes of pregnancy and delivery".[33] The teratogenic effects of thalidomide are now well known and accurately documented. But there are many others equally dangerous to unborn and childhood health. Progestin, prescribed to treat those likely to spontaneously abort may also cause the female foetus to become masculinized. Stilboestrol is a drug prescribed to pregnant women likely to miscarriage, but it can also cause vaginal cancer in adolescent daughters. Some of the harmful drugs show their effects on children only months or years after being taken by pregnant mothers.

Regarding these and other known teratogenic agents it is already clear that physicians have an obligation not to prescribe them, to keep up-to-date as to the current findings of new dangerous drugs, and to advise pregnant mothers not to use certain drugs at all or at least not while pregnant. As for pregnant women, in our view there should be an obligation on them not to take these drugs at all, or use other prescription drugs carelessly and against the advice of their physicians. To date, it does not appear that any mother has in fact been held liable for drug related injuries to unborn children.

As for non-prescription drugs, one physician has written,

> "... suffice it to say that the unborn is most vulnerable to their toxic effects early in pregnancy, and that even small amounts of *any drug*, including common over-the-counter ones such as aspirin, can be harmful to him."[34]

While occasional taking of non-prescription drugs during pregnancy does not put the unborn at serious risk, excessive use well may. Here too therefore it would seem there should be an obligation on physicians to caution pregnant mothers to that effect, and on the pregnant mothers to avoid excessive consumption.

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32. Regarding drugs and the unborn, see, Thomas E. O'BRIEN et al., "Drugs and the Foetus", (1978) 15 *Birth and Family Journal* 58; Also, "Present Status of Drugs as Teratogens in Man", (1973) 7 *Teratology* 3.

33. W.A. BOWES, "Obstetrical and Infant Outcome: A Review of the Literature", in W.A. Bowes et al., *The Effects of Obstetrical Medication on Foetus and Infant*, Society for Research on Child Development, Monograph Series, No. 137, 1970, at p. 4.

34. Thomas VERNY, *The Secret Life of the Unborn Child*, Collins, Toronto, 1981, at p. 92.

Drug addiction in pregnant mothers can also cause serious disabilities in unborns and newborns. Children born of drug addicts often have serious behavioural problems as a result.

As for alcohol,[35] it has been estimated that a consumption of over two ounces daily by a pregnant mother risks "foetal alcohol syndrome" in the unborn and child. It is undisputed that, "... the more a woman drinks, the greater her child's chances of being born mentally retarded, hyperactive, with a heart murmur or with a facial deformity...".[36]

Cigarettes as well can cause serious disabilities such as slow growth, poor physical condition, reading difficulties and psychological disorders in the unborn if used excessively by pregnant mothers. Smoking is now known to do its harm by cutting the supply of oxygen in the blood of the mother (and hence of the unborn as well).[37]

Antenatal pediatrics and teratology have now convincingly demonstrated that inadequate maternal diet can have seriously harmful effects on the unborn, continuing well into childhood. For example, a low protein diet by pregnant mothers can cause mental deficiency in children, and chronic malnutrition can induce premature labour, toxemia and other complications.[38]

As for maternal infections such as syphilis, measles, chicken pox, small pox and influenza, they can all have serious teratogenic effects on the newborn. For example, maternal syphilis can cause mental retardation and congenital deafness. Obviously these effects will be life-long. It is difficult not to conclude that pregnant mothers have a duty to take reasonable steps to cure their infections, failing which they are liable for resulting injury to their unborn children.

Recent studies[39] have demonstrated convincingly that a by-product of most of the above acts or omissions and many others is

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35. See regarding alcohol, "The Fetal Alcohol Syndrome: Alcohol as a Teratogen", (1978) 11 *Drug Abuse and Alcoholism Newsletter* (4).

36. VERNY, *op. cit.*, note 34, at p. 92.

37. See FRAZIER et al., "Cigarette Smoking and Prematurity: A Prospective Study", (1961) *American J. Obstet. & Gynec.* 988; M. LIEBERMAN, "Smoking and the Fetus", (1970) *American Journal of Obstetrics.*

38. See for example, TOMPKINS et al., "The Underweight Patient as an Increased Obstetric Hazard", (1955) 19 *American J. Obstet. & Gynec.* 114; WARKENAY, "Congenital Malformation Induced by Maternal Dietary Deficiency", (1955) 13 *Nutr. Rev.* 289.

39. See, VERNY, *op. cit.*, note 34; D.H. STOTT, "The Child's Hazards in Utero", in J. Howells, ed., *Modern Perspectives in International Psychiatry*, 1971, 19.

acute and possibly life-long anxiety and fear in those so exposed or neglected. As well, most unborn children who were exposed to the continuous and unresolved stress of their pregnant mothers, especially maternal stress arising out of family tension, were born (and remained) sickly and anxious. Emotional security and well-being is in other words as vitally important to the unborn as to children generally.

## IV. THE UNBORN AS CHILD

### 1. New Emphasis on Persons and Protections

In this section we will indicate (in very summary fashion) the existing or proposed protections available for children, confining ourselves only to those which could be adapted, at least as regards their orientation and intent, to the protection of unborn children as well. Our conclusion will be that there is no reason why essentially the same orientations and similar legal responses could not be adapted to include the unborn within the circle of creditors of an obligation of security and of those in need of protection as is the case with children. But to do so effectively and unambiguously, a legal stance including the unborn within its protective umbrella would have to be more explicit and coherent than it presently is.

The sources of most relevance at this point are: the Civil Code; the Draft Civil Code (Report on the Québec Civil Code, 1977); Bill 89 (now Book Two of the (New) Civil Code of Québec, "The Family");[39a] the *Youth Protection Act*; the Code of Civil Procedure; some jurisprudential decisions. When relevant we will also refer to some common law statutes and jurisprudence.

Particular parts and articles of the Civil Code, Draft Civil Code and Bill 89 are of special interest. In the Civil Code: articles 242-245j ("of parental authority") and articles 246-351 ("protection of the incapable"). In the *Draft Code*: Book I, articles 24-29 ("provisions relating to children"); Book I, articles 125-240 ("protected persons");

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39a. Bill 89 was entitled, *An Act to establish a new Civil Code and to reform Family Law* (L.Q. 1980, c.39). It was proclaimed on March 4, 1981 (G.Q. 1981.II.1087) and came into force on April 2, 1981 as Book II of the *Civil Code of Québec*. There are therefore two Civil Codes presently in effect in Québec, *The Civil Code of Lower Canada* and the *Civil Code of Québec*. On this see P.-A. CRÉPEAU, *The Civil Codes*, a critical edition, Centre of Private and Comparative Law, McGill University, Montréal, 1981 at p. VII. To avoid possible confusion we will refer to Book II of the *Civil Code of Québec* by its earlier title of Bill 89.

Book II, articles 350-370 ("parental authority"). In *Bill 89*: articles 645-659 ("of parental authority").

A first point to note by way of context is that the Draft Code (compared to the Civil Code) puts a new and emphatic emphasis on both *persons* (as opposed to property) and on *protection* of persons including children (as opposed for instance to the former stress on parental rights). As stated in the Preface of the Draft Code:

> "It has often been said that the Civil Code was designed for landowners and those in a position to live off their investments, that it is more concerned with the protection of property than with respect for human rights. It was for this reason that there existed a desire that the recognition of the role of the human person, along with the affirmation and protection of human dignity, be one of the main features of the Draft."[40]

The Draft Code begins its emphasis on person and the rights and duties attached already in its first article: "Every human being possesses juridical personality". And in the matter of children, they are not only afforded more responsibility, but, as we shall indicate below, there is a new and strong emphasis in the Draft on protecting children and minors from abuse by neglect or positive acts.

### 2. From Parental Rights to Parental Duties

As regards the role of parents, the Civil Code contents itself with an affirmation of parental rights:

> "A child, whatever may be the age, owes honour and respect to his father and mother." (art. 242 C.C.).
>
> "He remains subject to their authority until his majority or his emancipation." (art. 243 C.C.).

The Civil Code has already recently dropped the phrase originally found in article 243 C.C. to the effect that, "the father alone exercises this authority during marriage". The Draft Code endorses this shift from paternal authority to parental authority in II.350, 354, but goes much further. In effect there is a radical shift away from parental rights and authority for their own sake, to a stress on parental rights and authority being vested in them in order to better perform their supportive and protective roles towards their children:[41]

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40. Paul-A. CRÉPEAU, *Report on the Québec Civil Code*, Vol. I, Draft Civil Code, Éditeur officiel, Québec, 1977, at p. XXIX.
41. In, Civil Code Revision Office, *Report on the Québec Civil Code*, Vol. II, Commentaries, Tome 1, Éditeur officiel, 1977, it is noted that, "The suggested changes are in keeping with the spirit of the *Declaration of the Rights of the Child*, adopted by the United Nations. The entire title must be read in the light of article 24 of the Book on Persons...", (at p. 120).

— "Authority is vested in parents so that they may execute their obligations towards their children." (II.351 Draft Code)

— "Parents have the rights and duties of custody, supervision and education of their children.

They must maintain their children.

They represent them in all civil acts." (II.353 Draft Code).

This obligatory character of parental duties to children of II.353 Draft Code was adopted (with slightly different wording) and is now law, in Bill 89:

> "The mother and father have, with regard to their child, the right and the duty of custody, surveillance and education.
>
> They must nourish, and maintain their children." (Bill 89, art. 647).

As for the intensity of the parental obligation to children, it is one of diligence:

> "Parents are bound to ensure with prudence and diligence the education and supervision of their minor children." (V. 97, Draft Code).

As regards the unborn, in our view there are two points of relevance to them to be drawn from the above. The first is that the shift from a stress on the authority and responsibility of the father (alone) to include the mother as well, if extended to unborn children and not just born children, would perhaps add support to proposals to attach liability to the pregnant mother for violations of (her) duty to the unborn child resulting in prenatal injury. The second is that the same shift from parental authority for its own sake to its exercise to nourish, supervise and maintain their children, could and should apply equally to their unborn children, and for all the reasons already indicated.

### 3. **Children's Rights**

Until recently the rights of children as regards their health and welfare were clearly underlined in the Draft Code, Bill 89 and the *Youth Protection Act* far more explicitly than in the Civil Code. However, among the provisions of the recently enacted Bill 89 was the addition of article 30 to the Civil Code. This new Code article provides that the guiding principle as regards the rights and interests of the child is the following:

> "In every decision concerning a child, the child's interest and the respect of his rights must be the determining factors."[41a]

41a. This new Code article is based upon and similar to I.25, Draft Code.

A similar principle was already enunciated in the *Youth Protection Act:*

> "Respect for the rights of the child must be the determining consideration in making any decision in his regard under this act." (art. 3, *Youth Protection Act*).[42]

More specifically the particular health and well-being rights of the child are these:

> "Every child is entitled to the affection and security which his parents or those who act in their stead are able to give him, in order to ensure the full development of his personality." (I.24, Draft Code).
>
> "A child is entitled to receive adequate health services and social services and educational services, on all scientific, human and social levels, continuously and according to his personal requirements, account being taken of the organization of the resources of the establishments providing such services." (art. 8, *Youth Protection Act*).

It is of interest to note that child welfare statutes or proposed statutes in the common law provinces infrequently or never refer explicitly to the health and welfare *rights* of the child. An exception in this regard was the *Report of the (B.C.) Royal Commission on Family and Children's Law.*[43] The first three of the rights that the Commission proposed are of relevance to our concerns:

> "1. The right to food, clothing and housing in order to ensure good health and personal development.
>
> 2. The right to an environment free from abuse, exploitation and degrading treatment.
>
> 3. The right to health care necessary to promote physical and mental health and to remedy illness."

Again, three points relevant to the unborn child may be drawn from the above. The first has to do with the *positive* and *affirmative* nature of the child-oriented rights referred to above. They quite clearly do not include only a right not to be harmed by positive acts of negligence. Rather they are rights to positive acts of health care and support (matched by the obligations of parents to provide that care, referred to in the previous section). As we have already maintained, it is this same positive thrust, these same positive rights, which if extended to the unborn as well, would best ensure their needs and promote their health.

Secondly, the interests of the unborn, just as of the child, deserve (on grounds of continuity between unborn and child) to be, if not

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42. *Youth Protection Act*, R.S.Q., c. P-34.1.

43. (B.C.) Royal Commission on Family and Children's Law, Report V, Part IV, *Special Needs of Special Children*, Vancouver, 1975, at p. 5.

"the", at least "a", determining factor in decisions affecting him. Thirdly, in the light of our earlier discussion of the vulnerability and needs of the unborn, the same attention to the right to mental and emotional health rightly claimed for the child, should be equally recognized in and for the unborn child. In both cases the needs are not just physical, but involve as well, affection and security.

### 4. "Safety and Development Compromised"

Still more specifically, what circumstances are accepted as evidence that, "the safety or development of a child is compromised" (art. 38, *Youth Protection Act*), or that there is a "serious reason" to deprive parents of their parental authority (Bill 89, art. 654)? And do any of these circumstances fit the context and circumstances of the endangered unborn child?

In Québec, article 38 of the *Youth Protection Act* lists the circumstances which will lead to a decision that, "the safety or development of a child is compromised", as (in part) the following:

> "(a) his parents are dead, no longer able to take care of him or seek to be rid of him and no other person is taking care of him;
>
> (b) his mental or emotional development or his health is threatened by the isolation in which he is maintained or the lack of appropriate care;
>
> (c) he is deprived of the material conditions of life appropriate to his needs and to the resources of his family;
>
> (d) he is in the custody of a person whose behaviour or way of life creates a risk of moral or physical danger for the child;
>
> (f) he is the victim of sexual assault or he is subject to physical ill-treatment through violence or neglect."[44]

Clearly not every circumstance of the above subsections of article 38 can apply to the context of the unborn — obviously the unborn cannot be "sent away", and he cannot be "kept in isolation" (at least not from his pregnant mother), and he cannot be subject to sexual abuse or moral danger. But in view of what we indicated earlier regarding the vulnerability and needs of the unborn, all the circum-

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44. *Youth Protection Act*, R.S.Q., c. P-34.1, art. 38.

Similar circumstances are generally indicated in the Child Welfare Acts of the common law provinces as establishing that a child is, "in need of protection". See for example, *The Child Welfare Act* (Ontario), R.S.O. 1970, c. 64, art. 20. As for the United Kingdom, its *Children and Young Persons Act* of 1969 states that a child is "liable to care proceedings" if: "... his proper development is being avoidably prevented or neglected or his health is impaired or neglected, or he is being ill-treated". s.1(2) (a).

stances underlined in the above subsections can and do apply readily to the unborn.

But if these are the circumstances indicating the need for protection of the child (and the unborn), what criteria are to be used by a social service or a court to decide that the abuse or neglect is of a *sufficiently serious degree* to call for an intervention? It has after all been objected to social and legal interventions to protect the child that such intervention is both unnecessarily disruptive of family life as well as parental responsibility, and that there is sometimes a tendency to apply a too rigorous or utopian standard in deciding when parents have failed and an intervention is called for. The same criticism could be directed to efforts to pin down and beef-up parental duties to their unborn children, and broaden the circumstances in which they can be presumed to have failed to perform their obligations to them.

However, while the criticism does point to difficulties in practice, it is not difficult to effectively respond to it in principle. The answer is quite simply that in determining whether a child is in need of protection (and what degree and type of protection would be in that child's interest), the criterion to be applied is not whether the parents are or are not doing the *best possible* job for their children (or unborn children) but whether they are providing *adequate* support and care. Violations of that duty must normally be serious and continuous to provoke the intervention of a social service and/or a court.

As regards children, the following assessment has been made about child-welfare decisions by Québec courts:

> "Une jurisprudence importante nous indique que seules des causes graves ou exceptionnelles, désignées sous le terme général 'd'indignité' peuvent faire échec à l'autorité parentale et au droit de garde."[45]

That assessment and the following would hopefully be applicable to determining the adequacy of parental care both of their children and their unborn children:

> "A child is not shown in need of protection simply because an agency can satisfy a judge that it can offer the child preferable circumstances to those provided by the parents. Before the question of disposition can arise, a child must be shown to be in need of protection or care according to *objective standards*. Judicial recognition of the good intentions ... of welfare personnel and of their capacity

45. Claude BOISCLAIR, *Les droits et les besoins de l'enfant en matière de garde: réalité ou apparence*?, Publication de la Revue de Droit de l'Université de Sherbrooke, 1978, at p. 28.

to improve the child's material and other conditions of life is not in itself a sufficient basis for intervention between parent and child."[46]

If, as we suggest, the same standard is to be applied regarding the unborn, then a pregnant mother's one glass of liquor too many one day, or one prenatal checkup forgotten, or a loud argument with her husband, will not result in a social agency or court deciding that the safety or development of her child is compromised.

### 5. Childrens' Protections

We turn now to the specific mechanisms of protective intervention already available or proposed for children in the matter of health care and protection from abuse. The first of these is the institution of tutorship.

First of all, three general observations about the mechanism of tutorship. Under previous Québec law parents have authority over the person of children (art. 243 C.C.). But as already indicated above, II.353 Draft Code and its enactment as article 647 of Bill 89 is new law in the sense that parental authority and rights have been re-oriented to include explicit reference to parental duties as well. But the third paragraph of II.353 Draft Code is also new law in the sense that it confers of right on parents tutorship to the person of their children: "They [parents] represent them [their children] in all civil acts". This would mean when enacted[47] that parents would be legal tutors over their children, and it would not be necessary to seek formal court-appointed tutors when representation is needed and one or both parents is alive. Parental legal tutorship over their minor children is thus an example of the major reform of article 249 C.C. which affirms that, "All tutorships are dative...", which in the Draft Code has

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46. B. DICKENS, "Legal Responses to Child Abuse", (1979) 12 *Family Law Quarterly* 1, at p. 24.

    A similar comment has been made by Jeffery WILSON with regard to the provisions of s.20 of the (Ontario) *Child Welfare Act*, "The criteria underlying the definitions provided for in s.20 should not be based on what is 'in the best interest of the child' but rather what is necessary to raise the child's standard of care back to an acceptable minimum level" (*Children and the Law*, Butterworths, Toronto, 1978, at p. 49).

47. This third paragraph of II.353 was not included in its enacted form in article 647, Bill 89. No doubt that omission was because other parts of the Civil Code have not yet been revised. When they are, one assumes this paragraph will re-appear.

become, "Tutorship to minors is legal, dative or testamentary". (I.126 Draft Code).

A second general observation about tutorship in the Draft Code is that the purpose of this institution or mechanism is clearly that of protection — "Tutorship is intended to ensure *protection* of the person and of the patrimony, or of the patrimony only." (I.125 Draft Code).

A third general point has to do specifically with the unborn. Insofar as article 345 C.C. is omitted altogether from the Draft and no provision is made for a "curator to the womb", it seems reasonable to conclude that the mechanism of tutorship could be extended to the unborn when necessary and that parents would be *ex officio* tutors to the person of their unborn child. Presumably tutorship for the unborn could be justified under the general principle of I.28 Draft Code, "A child conceived is deemed born provided he is born and viable". As a general principle, no longer limited to matters of property or inheritance, I.28 Draft Code would seem to allow the unborn to be "deemed born" for the sake of a tutorship to his person for *any* purpose in the unborn's interest. And since tutorships are essentially protective, so too should be tutorships to the unborn.

According to the Draft Code then parents would have authority over their children, have specific duties towards them and *ex officio* be legal tutors to their person (and property). But while the duty to provide appropriate care to children and be *ex officio* their tutors is normally and rightly theirs, if they are unwilling or unable to so provide, as demonstrated by the various circumstances (referred to earlier) listed in article 38 of the *Youth Protection Act*, then any interested party may apply to a court for the withdrawal of parental authority and its substitution by a regime of *dative* (or court-appointed) tutorship. As I.168 Draft Code states,

> "Dative tutorship to minors is conferred by the court ... when,
>
> 1. Both parents have died without appointing a testamentary tutor, or they cannot exercise parental authority;
> 2. The parents have been deprived of parental authority;
> 3. The parents have seen their legal tutorship to the child's property withdrawn."

Articles 654 and 655 of Bill 89 affirm (in part) that:

> "The court may for a serious reason and in the interest of the child, pronounce at the request of any interested party, the total or partial withdrawal of parental authority with regard to the father and the mother, or one of them, or a third party to whom parental authority has been given." (art. 654, Bill 89).
>
> "The court may, at the moment it pronounces the withdrawal ... proceed to the nomination of a tutor." (art. 655, Bill 89).

This total or partial withdrawal of parental responsibility over children from those who abuse it or neglect it, appears, in principle at least, equally applicable to a withdrawal of parental responsibility over the welfare of an unborn child, and its substitution by a dative tutorship. Assuming, as we have argued, that needs, neglects and abuses of both the unborn and children are essentially the same and continuous, then both withdrawal of parental responsibility and its substitution by dative tutorship ought to be available to both.

Whether in the case of the unborn such a decision would be in practice helpful and realistic given the unique circumstances of mother and child being (physically) inseparable before birth, would depend on the particular decisions, supervision, assistance, and protections imposed by the dative tutor. Obviously they would have to be adapted to the realities of the unborn child and the pregnant mother. In our view, as we shall indicate below, some of the particular protective mechanisms available to children could be realistically and helpfully adapted by a tutor, a court, a social agency or another supervisor to the special circumstances and needs of the unborn.

The protective solution of dative tutorship is in fact imported into the Draft Code and Bill 89 from the *Youth Protection Act* (art. 91).[48] But dative tutorship is only one of a number of specific protective mechanisms made available in that Act, some of which we will now briefly consider.

Article 54 of that Act first of all indicates a number of legally supported but *voluntary* protections available to children. They are those which could be recommended by a director of a social services centre. Among them are:

> "a) that the child remain in his family environment and that his parents present a report periodically on the measures they apply in their own or in their child's regard to correct a previous situation.
>
> b) that a person working for an establishment or body provide aid, counsel or assistance to the child and his family.
>
> e) refer the child to a hospital centre, a local community service centre or to a body in order that he may there receive the care and assistance he may need;
>
> g) that the child receive certain health services."

Some of these voluntary child-oriented protections could be readily adapted to fit the context of the unborn child as well. Their effectiveness would lie largely in their voluntary character. As

48. See Report on the Québec Civil Code, Vol. II, *Commentaries, op. cit.*, note 41, at p. 121.

voluntary measures they would acknowledge (as they do already in the case of children) that protection of the unborn child need not be contentious and adversary, because many pregnant mothers are more *unable* than *unwilling* to cope with the stresses of pregnancy and the nutritional and other needs of their unborn children. If the experience of welfare services regarding parental *requests* for help with their children is any guide,[49] there is every reason to expect that many parents of unborn children are ready to acknowledge that they need help when their unborn children are at risk and will ask for it or at least accept it voluntarily if offered.[50]

As for the specific protections of article 54 of the *Youth Protection Act* listed above, they all seem readily applicable to the unborn child. Given the special circumstance of the unborn as opposed to the child, namely that it cannot be separated from its mother until birth and sent to a "place of safety", effective protections will obviously have to assume that (physical) inseparability. Therefore the home is the natural and best environment in which to direct aid and supervision. Removal of mother and unborn child to a hospital, clinic or another home should only be proposed as a last resort to lessen unbearable pressures of home, husband, other children or to provide material or offer aid not otherwise available.

Article 91 of the *Youth Protection Act* provides that if the security or development of the child requires it, the protective measures in article 54 can be *ordered* by a court, as well as those measures proper to article 91. These new measures of article 91 bring us back to the subject of (dative) tutorship, in that this article also provides for the (court-ordered) withdrawal of the exercise of certain rights of parental authority and may recommend that measures be taken before the Superior Court for the naming of a tutor.

Though tutorships are strictly speaking *to the child*, in the case of the unborn child, given its location in the mother's womb and dependance upon the mother, a tutorship to the unborn child would in

49. See for example E. DELEURY, J. LINDSAY, M. RIVET, *Protection et Delinquance*, Les Presses de l'Université Laval, Québec, 1978, at p. 36. See also B. DICKENS, "Legal Responses to Child Abuse", *loc. cit.*, note 46, at p. 23.

50. Two "voluntary" protections available to children under the *Child Welfare Act* (Ontario) R.S.O. 1970, c.64, which could also be readily adapted to the unborn child context, are, the placement of a "homemaker" in the home in which a child has been discovered to be apparently neglected (s.22a), and "non-word agreements", a written agreement between the parent or parents and the child welfare society (or Minister) for the care of a child for an agreed upon period (s.23a).

effect have to take the form of a supervision of the unborn child's pregnant *mother*. The interest and purpose of the tutorship could still remain primarily the health and welfare of the unborn child, but clearly the pregnant mother and her conduct, habits and needs, would have to be the person to whom most supervisory attention is directed. It remains true after all, that the unborn child is affected for good or for ill especially via the mother.

## V. THE MOTHER-TO-BE AS DEBTOR

There appears to be nothing in the Civil Code or in Québec civil law jurisprudence which would preclude the pregnant mother herself from being liable for violations of a duty to provide prenatal care in the extended and positive sense we have been proposing. Article 1053 C.C. after all affirms with no such restriction or limitations that, "*Every person* capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill".

As for the meaning of "another", Québec jurisprudence and especially *Montreal Tramways Co.* v. *Léveillé*[51] has long included the unborn within the circle of creditors at least to maintain an action, once born, for prenatal injury resulting from violation of duty. As far as we are aware, no Québec court has yet been faced with the issue of a mother's liability to her unborn child for prenatal injury.

Inasmuch as objections to expanding the circle of debtors to include the pregnant mother would have to be policy objections rather than strictly legal objections, some of these objections should be briefly noted and responded to at this point. A conclusion and by-product of considering these objections and possible responses is, in our view, a further indirect support for the extension of juridical personality to the unborn.

A first group of objections to allowing maternal liability is to the effect that to allow such actions would be equivalent to demanding perfect babies, and thus imposing an impossible and unjustified burden on mothers-to-be. However, this objection is often in reality more of an objection to an *extreme* defence of maternal liability than it is to the principle itself. Consider for example this claim by Margery Shaw:

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51. *Montreal Tramways* v. *Léveillé*, *supra*, note 1.

> "Withholding of necessary prenatal care, improper nutrition, exposure to mutagens and teratogens, or even exposure to the mother's defective intrauterine environment caused by her genotype, as in maternal PKU, could all result in an injured infant who might claim that its *right to be born physically and mentally sound* had been invaded."[52] [emphasis added].

To which Alexander Capron has responded,

> "The enforcement of such a rule by the state, through the courts and other agencies of social control, might even lead to unprecedented eugenic totalitarianism."[53]

George Annas adds:

> "The most fundamental objection is that there is no 'right to be born physically and mentally sound', and should not be. Such a 'right' could almost immediately turn into a duty on the part of potential parents and their caretakers to make sure that no defective, different or 'abnormal' children are born."[54]

In our view there is much that is sound in these objections. There is indeed no "right to be born physically and mentally sound". Such an all-inclusive and general "right" carries all the limitations and connotations of the World Health Organization definition of health, and even if it were justified it could hardly be enforceable left at that wide level of inclusiveness.[55] Such a "right" does appear rather too frequently and uncritically in both legal writing and (common law) jurisprudence.[56]

But inasmuch as the right we are proposing is considerably less than a "right to be born healthy", the above objections to maternal liability must fail. As indicated earlier, the applicable standard as to

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52. Margery SHAW, "Preconception and Prenatal Torts", in Aubrey Milunsky and George J. Annas, editors, *Genetics and the Law II*, Plenum, New York, 1980, at p. 225.

53. Alexander CAPRON, "The Wrong of Wrongful Life", *op. cit.*, note 52, at p. 89.

54. George ANNAS, "Righting the Wrong of 'Wrongful Life' ", (1981) 11 *Hastings Center Report* 8, 9.

55. For objections to the WHO definition of health see Daniel CALLAHAN, "The WHO Definition of Health", (1973) 1 *Hastings Center Studies* 77.

56. See for example Marc AMENT, "The Right to Be Born Healthy", *The Journal of Legal Medicine*, November/December 1974, 24. He defends a "right to be born healthy", which he bases upon *Smith* v. *Brennan*, 31 N.J. 353, 157 A. (2d) 497 (1960). In that judgment the court stated, "... justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body". See also the Ontario case of *Re Brown*, (1975) 21 R.F.L. 315, at p. 323 (Ont.). In that case the court listed among the rights every child should have, "the right to be born healthy".

whether a child is in need of protection, equally applicable to determinations about a violation of a duty to provide maternal care, is not whether the *best possible* was done, but whether *adequate* care was provided. Neither physicians nor mothers would be required to provide more than reasonable care and skill according to what is adequate and possible. Mothers would not be held to total success or perfection as a standard — that would be an obligation of result. Instead, as already indicated, the intensity of the obligation whether for mothers, physicians or others would be that of diligence.

Another type of objection is in reality a denial that the unborn has juridical personality, that he is a subject or a patient. If the unborn is not a patient, not a subject, but essentially only an extension of the mother, then first of all one can only be liable for prenatal injury to the unborn if there is also liability and injury to the mother, and secondly the mother herself cannot really be liable herself to what is after all only an extension of herself and not a bearer or subject of rights.

The (U.K.) Law Commission in its *Report on Injuries to Unborn Children* argues more or less in that manner.[57] It first of all advances the traditional common law view that, "The unborn plaintiff has no legal existence at the time of his injury, nor has he, prior to live birth, an existence separate from his mother".[58] It then states that one only has a duty to someone with whom one has a special relationship, but that there can be no such relationship when one party (the unborn) is not in existence, and therefore, "... as a general rule whenever there is liability at common law to a mother for an act or omission which causes prenatal injury, the child should be entitled to recover damages".[59]

One result is that the unborn child himself is not really a patient to a doctor — only the mother really is in the full sense. Quite apart from the legal premise here, the denial of legal personality to the unborn, to weaken the status of the unborn as a patient in his own right, deserving of direct attention and concern, is to fly in the face of growing medical perception and experience regarding the unborn. But a second result is that it is easier to rule out maternal liability for prenatal injury. The Commission in fact concludes that,

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57. Law Commission (U.K.), *Report on Injuries to Unborn Children*, London, 1974. (This Report was the basis for the *Congenital Disabilities Act*, 1976, c.28).

58. *Id.*, at p. 15.

59. *Ibid.*

> "... as a general rule, legislation should specifically exclude any right of action by a child against its mother for prenatal injury."[60]

This objection to maternal liability of course stands or falls on its premise, that the unborn has no (legal) existence, is not a subject, not a patient. In our view that premise itself is wrong, and so the objection fails. It is wrong not just on grounds of logic or coherence, but largely because, as the Law Commission's position and objection itself demonstrates, unless legal personality, inviolability and a right to prenatal care is extended to the unborn, it remains dangerously exposed to prenatal harm, as there is no firm anchor hold for the right to receive adequate prenatal care. If only the mother is a legal person and has rights, then the unborn's interests cannot ultimately stand or prevail against even the wishes and bad habits of the pregnant mother, even if those wishes and bad habits threaten the unborn's life and health.

A last objection has to do with the *Criminal Code* and s.251(4), the pregnant mother's right to abortion. Does not this "right" render meaningless any attempt to establish for the unborn a right to life and inviolability, rights which must be established if it is to be claimed that the unborn has a right to prenatal care? We think not. A comprehensive response to this objection should be long and detailed. Unfortunately space limitations permit only a somewhat sketchy and summary outline.

Our answer is in two parts. The first part is to the effect that the pregnant mother's "right" to abortion is actually very narrowly defined in the *Criminal Code*. The second part of our answer is that the possibility of abortion does impose a particular condition on the unborn's rights to life, inviolability and prenatal care. Though the *Code* only grants the full protection of criminal law from the time one becomes a "human being" (for criminal law purposes), namely at the moment of birth, s.206(1), nevertheless the unborn is afforded considerable protection, and from conception to birth. According to s.251 abortion is a crime, and equally so at every stage of gestation. Section 221(1) makes killing an unborn child in the act of birth an indictable offence. Section 226 provides that a pregnant woman who does not seek necessary assistance when about to give birth commits an indictable offence. The single justification for abortion is found in s.251(4), namely that it is approved by a therapeutic abortion committee because continued pregnancy would be likely to endanger the mother's life or health.

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60. *Id.*, at p. 25.

In view of that exceptional justification of abortion, there is a condition thus imposed on the unborn's right to life, inviolability and prenatal care. Those rights are not rendered meaningless, but they cannot be unaffected. We would formulate the results for the unborn in this manner: the unborn's rights to life, inviolability and prenatal care would *arise* at the time the parents (or mother) know of the pregnancy, and would continue to have effect from then to viable birth until or unless the mother decides, for the exceptional reason allowed in s.251(4) and s.221(2) to undergo a therapeutic abortion. At that point and for that reason (only) the mother's interest in life and health would prevail over those of the unborn.[61]

Formulated in this manner the unborn child's right to prenatal care would not be absolute, but nor would it have to give way to "frivolous" (by comparison) rights, interests, wishes and habits of the pregnant mother. It should not have to give way therefore to a mother's wish to smoke or drink excessively when those habits threaten the life or health of the unborn child.[61a]

In our view, without such a policy, the unborn's right of action for prenatal injury would be seriously compromised, and so too therefore

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61. Another formulation of this condition imposed by s.251 (4) was proposed by the B.C. Royal Commission on Family and Children's Law (Fifth Report, Part V, *The Protection of Children (Child Care)*, Vancouver, 1975, at p. 65): "*Once a woman has decided to bear the future infant*, the laws of the province should emphasize individual responsibility to provide the infant with the kind of prenatal care that will prevent unnecessary jeopardy to the child". But in our view that formulation does not succeed as it leaves unprotected by law a long period in the life of the unborn child — there could be no legal duty to protect that unborn child from conception until the mother *decides to continue the pregnancy*.

A further difficulty with the B.C. formulation is that it seems to assume that all women make a conscious and explicit decision to bear or not bear their child. But what of those who make no explicit decision at all one way or the other and are more or less passive or fatalistic about it. Is that to count as a "decision", and when could "it" be counted as having been "made"? In our proposed formulation that problem would not seem to arise.

We have selected the time the pregnancy is known of, rather than the moment of *conception*, as the point at which the unborn's rights arise. In our view the difficulty with the moment of conception as the starting point of the rights in question is that until the pregnancy is *known* one cannot yet posit duties upon others to provide for needs and protections.

61a. It must be acknowledged however that this (or any other) proposed formulation cannot settle in advance *all* the possible conflicts between competing rights of unborn child and mother. What for example if the pregnant mother wishes to commit suicide, or requests death with dignity? Clearly these (and other) questions and conflicts will require careful attention and thought.

would be his available legal protection. Many of the potentially harmful acts and omissions are after all within the mother's power to control or not. To impose such a legal duty is therefore only to recognize that those with the most power to help or hinder should also have a duty to exercise that power with care, and to compensate victims injured by their violations.[62]

## VI. PERSON RE-VISITED

### 1. Viable Birth — from Suspensive to Resolutory Condition

To this point we have attempted to establish several things. One is that the unborn child has health needs and vulnerabilities analogous to those of children, and that between the unborn child and child there is continuity in all essential respects, including the fact that many disabilities and injuries inflicted upon the child in its unborn state by positive acts or omissions continue to affect him in his childhood and adulthood state.

A second finding is that the child is provided with a full range of legal protections, both in terms of anticipatory interventions protecting him from further abuse or neglect, and a right of action for postnatal injuries resulting from violations of duties to provide adequate postnatal care.

Thirdly, the unborn child does not have available before birth these or similar anticipatory protections, nor a clear and determined right to maintain an action for prenatal injuries caused by a wide range of acts and omissions and by the fault of a wide range of debtors including his pregnant mother. What protections he does have available are essentially restricted to patrimonial matters.

Fourthly, the major legal reason for the unborn's generally unprotected state is that his full acquisition and exercise of legal personality and the rights to life, inviolability and adequate prenatal

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62. We therefore feel that the *Family Law Reform Act*, 1978 (Ontario), c.2, correctly acknowledges the possibility of maternal liability for prenatal injuries when it states:

"66. No person shall be disentitled from bringing an action or other proceeding against another for the reason only that they stand in a relationship of parent and child.

67. No person shall be disentitled from recovering damages in respect of injuries incurred for the reason only that the injuries were incurred before his birth."

care, now only have practical effect upon his viable birth. Legal personality and extra-patrimonial rights are in other words subject to the *suspensive condition* of viable birth.

Fifth, because legal personality and the rights to life and inviolability are not secure and assured before birth for *all* purposes in the interest of the unborn, the unborn's health and development needs are treated only as needs and not also as rights. One result is that the unborn's need for adequate prenatal care in practice continually gives way not only to the mother's exceptional and "negative" right to abortion, but to many maternal habits, or careless acts and omissions which are life or health threatening for the unborn. In other words, the present limits and uncertainties as to the fact and scope of the unborn's legal personality imposes a severe and unjust burden on the unborn child, often including life-long disabilities in the child and adult to follow.

Our conclusion is that in view of all the above it is now impossible to seriously maintain that the societal and legal interest in protecting the health and development of children and adults should begin only at birth, and that we should continue to leave unclear both the health and development rights of the conceived but unborn, and the corresponding parental and third party obligations to provide the necessary care, or the protective mechanisms to substitute for it when necessary.

But the fundamental starting point for such an effort must be at the basic level of securing the unborn's legal personality and the rights to life and inviolability which flow from it. These rights and the right to prenatal care cannot be absolute, and will require balancing with the competing rights of others. But so it is with all rights. But unless there is a legal personality on which they rest, there cannot be rights at all, only needs.

The crux of the matter then is birth and viability as a *suspensive* condition. As long as that condition remains, the unborn's rights and status will always remain in effect more or less potential until viable birth, and retroactive after viable birth. Viable birth *may* be justifiable as regards patrimonial rights, but it leads to strange and illogical results when applied generally. R. Dierkens has observed:

> "C'est en généralisant cette condition supplémentaire posée par la loi dans le domaine de l'acquisition des biens, que la doctrine en est venue à affirmer que la personnalité juridique ne commence qu'à la naissance d'un enfant viable. Solution d'autant moins admissible qu'elle dénie implicitement tout droit à l'enfant conçu mais non encore né viable, alors que la loi lui reconnaît explicitement la capacité de recevoir entre vifs et par testament; condition inopportune, au surplus, puisqu'elle oblige la doctrine à combler, à la naissance de l'enfant viable, le néant qu'elle a créé artificiellement, en faisant appel à une

> autre fiction: faire 'remonter' l'existence de la personnalité juridique à l'époque de la conception."[63]

In our view the solution to ensuring the protection of not only the unborn's patrimonial rights but his personal rights as well is to consider the unborn as a subject of rights on the *resolutory* condition of *not* being born alive and viable.[63a]

The advantages for the unborn of such a shift are obvious and several. The most important of these advantages is that obligations to the unborn as a legal person and subject of rights (including that of inviolability and that of prenatal care), arise immediately on conception. As Baudouin has noted on the subject of resolutory conditions:

> "Lorsque l'obligation est contractée sous condition résolutoire, elle est immédiatement en existence. Le créancier a donc, comme le créancier d'une obligation pure et simple, le droit de requérir du débiteur l'exécution immédiate de l'obligation. Il peut aliéner l'objet, l'hypothéquer et l'utiliser généralement comme bon lui semble, étant dans une position juridique identique à celle d'un créancier ordinaire, avec la réserve toutefois que son droit peut être anéanti par la réalisation de la condition."[64]

Applying the resolutory condition solution to the unborn, viable birth would become no longer a condition of the *acquisition* of rights, but only for their *exercise*. As well, at least some of these rights could be exercised in the form of anticipatory interventions and protections, whether by a tutor, a social service agency or in the form of a court-ordered supervision order.

As R. Kouri has noted, considering viable birth as a resolutory condition would have an immediate and practical effect:

> "On ne se poserait plus la question académique de savoir si l'enfant conçu est une personne. Nous saurions que cet être, quel qu'il soit, jouirait de la protection accordée par le droit positif."[65]

### 2. Some Implications for the Civil Code and Statutes

As regards the Civil Code, a first and fundamental question is whether the clear and unambiguous affirmation of the unborn's juridical personality, right to life and inviolability, and right to adequate

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63. R. DIERKENS, *Les droits sur le corps et le cadavre de l'homme*, Masson et Cie, 1966, at p. 38.

63a. This is the solution proposed by R. KOURI, "Réflexions sur le statut juridique du foetus", (1980-81) 15 *R.J.T.* 193.

64. BAUDOUIN, *op. cit.*, note 5, at p. 326.

65. KOURI, *op. cit.*, note 63a, at p. 197.

prenatal care deserve to be found in the Civil Code at all. It could be argued for instance that the unborn's right to prenatal care would be more appropriately reserved for another place, such as within an existing or new statute.

A criterion for inclusion in the Code has been proposed by P.-A. Crépeau:

> "Il est certes vrai que le *Code civil* ne saurait renfermer tout le droit civil. Il est, certes, également vrai que toute législation de droit civil ne peut trouver place, ou si l'on ose dire, ne mérite pas de trouver place dans un Code civil. Certains textes législatifs, en effet, ne répondent qu'à des besoins temporaires, éphemères, par exemple, le contrôle des prix ou la fixation des loyers en temps de guerre ou de crise économique; d'autres textes doivent passer par ce que l'on pourrait appeler le 'noviciat' législatif afin précisément de vérifier s'ils répondent à des besoins d'un caractère permanent, s'ils peuvent, en quelque sorte, s'élever au rang des règles générales de droit commun; ainsi par exemple, la législation récente sur la protection du consommateur."[66]

In our view, not only the matter of the unborn's legal personality, right to life and right to inviolability (on the resolutory condition of viable birth) merit explicit inclusion in the Code, but also the right to prenatal care. In the first place, as we have attempted to demonstrate, all of them respond to more than just "temporary needs". The implications of both the juridical status of the unborn and the rights which flow from it are so serious and long-lasting that at least general affirmations that these rights exist and have as their anchor-hold the legal personality of the unborn are much more in the nature of general principles than details subject to continual change and revision.

If that is so, then it would follow that for instance I.1 Draft Code could be expanded from its present form, "Every human being possesses juridical personality", to include a subsection to the effect that human being is to include the conceived but unborn, for whom juridical personality is subject to the resolutory condition of viable birth. And/or I.28 Draft Code could be changed from its present form, "A child conceived is deemed born provided he is born alive and viable" to, "A child conceived is deemed a juridical person unless or until not born alive and viable".

As for V.94 Draft Code (the proposed new form of article 1053 C.C.), it too could be revised. It presently states, "Every person capable of discernment must behave towards others with the prudence and diligence of a reasonable person". A subsection could be added to

66. P.-A. CRÉPEAU, "La révision du Code civil", *Cours de perfectionnement du Notariat*, 1977, at p. 344.

the effect that "others" includes for the purpose of prenatal care the conceived but unborn.

As for I.15 Draft Code, paragraph 1 of which states that, "The human person is inviolable", this too could have added to it that (for civil law purposes at least) legal personality and therefore inviolability is extended as well to the conceived but unborn.[66a]

These general affirmations of principle in the Code would not of course be the only Civil Code protections available to the conceived but unborn. First of all, once the legal personality of the unborn is clearly and explicitly affirmed in the Code, as secure and protected as that of the child, then more or less automatically all the Draft Code anticipatory protections available to the child would also be available to the unborn child, for example the withdrawal of (some) parental authority, dative tutorship and so forth.

As well, a number of other Code provisions posited upon one being the subject of rights and the creditor of obligations, would also become available to the unborn to secure the fulfillment of obligations such as prenatal care. For example, on the basis of V.267, 268 Draft Code (the proposed revision of article 1065 C.C.) the unborn creditor through its tutor may demand the specific performance of the obligation of prenatal care, by stopping a harmful act, (excessive drinking) or providing needed care (an adequate maternal diet).

Or, on the basis of V.151 Draft Code (the proposed revision of article 1086 C.C.), the unborn child may ensure the *conservation* of his threatened right to prenatal care before the fulfillment of a condition.

And with the clear affirmation of the unborn as the subject of rights and creditor of obligations, a mechanism such as an injunction, as provided for in article 751 Code of Civil Procedure, could also be used to protect and enforce adequate prenatal care. One can readily foresee many of the needed acts of prenatal care or harms to prenatal health as discussed earlier being included within the range of a court, "... enjoining a person not to do or to cease doing, or in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties" (art. 751 C.C.P.). The benefit of access by the unborn to this mechanism is that it can be invoked *before* the danger if there is a reasonable fear of harm. It should be noted that in view of the hesitation of courts to use injunctions which restrain personal liberty,

66a. In view of the revision proposed above of I.28 Draft Code, it may not of course be necessary to also revise V.94 Draft Code and I.15 Draft Code as suggested here.

this legal tool would be and should be used carefully and rarely insofar as its use would involve restraining the liberty of a pregnant mother. What would of course be at issue in each case is whether a degree of restraint on the pregnant mother's liberty is justified in view of the unborn child's competing claim to have his life or health protected.

Obviously the general affirmations of principle in the Code, and the availability of the above Code mechanisms would not be sufficient in themselves. Details and particular applications would still be rightly reserved to various statutes. For example, the *Youth Protection Act* could be amended to make available its child-oriented protective mechanisms equally (though with adaptations of course) to the unborn. The first step to doing so would be to simply amend the interpretation section in article 1(c), changing the meaning of "child" to include the unborn child as well.

In conclusion, one is encouraged by the very nature and dynamics of the Civil Code itself to believe that the sort of reforms suggested above on behalf of unborn children, might one day be found in a future Code revision. For in the Preface to the Draft Code we are assured that,

> "... il est essentiel de suivre l'évolution de la pratique et des moeurs afin d'adapter constamment le Code civil aux besoins nouveaux et toujours changeants de la société québécoise."[67]

67. P.-A. CRÉPEAU, *Rapport sur le Code civil du Québec*, Vol. I, Projet de Code civil, Éditeur officiel, 1977, Québec, at p. XXXVIII.